

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SCOTTIE RAY VAN NORT,

Plaintiff,

vs

GLEN FAIR, et al.,

Defendants.

3:09-cv-00110-RCJ-RAM

ORDER

Plaintiff, an inmate at the Nevada State Prison, is proceeding *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. Section 1983. Pending before the court is plaintiff's motion to file a longer than normal complaint (docket #13) and his proposed amended complaint filed July 16, 2010.

I. Screening Standard Pursuant to 28 U.S.C. § 1915A

The court must screen plaintiff's complaint pursuant to 28 U.S.C. §1915A. Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). To

1 state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right
2 secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation
3 was committed by a person acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48
4 (1988).

5 In addition to the screening requirements under § 1915A, pursuant to the Prisoner
6 Litigation Reform Act (PLRA), a federal court must dismiss a prisoner's claims, "if the allegation of
7 poverty is untrue," or if the action "is frivolous or malicious," "fails to state a claim on which relief may
8 be granted," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.
9 § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which relief may be granted is
10 provided for in Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under
11 Section 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint.

12 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.*
13 *Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a claim
14 is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that
15 would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In making
16 this determination, the Court takes as true all allegations of material fact stated in the complaint, and the
17 Court construes them in the light most favorable to the plaintiff. *See Warshaw v. Xoma Corp.*, 74 F.3d
18 955, 957 (9th Cir. 1996). Allegations in a *pro se* complaint are held to less stringent standards than
19 formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404
20 U.S. 519, 520-21 (1972) (*per curiam*).

21 All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the
22 prisoner's claims lack an arguable basis either in law or in fact. This includes claims based on legal
23 conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or claims of
24 infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual
25 allegations (*e.g.* fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989);
26 *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

1 **II. Screening Discussion**

2 A. Defendants

3 Plaintiff names various defendants in this action, including the Carson City Board of
4 Commissioners in its official capacity. A municipality may be held liable under a claim brought under
5 § 1983 only when the municipality inflicts an injury, and it may not be held liable under a respondeat
6 superior theory. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 (1978). Thus,
7 plaintiff must present facts which demonstrate that the Board of Commissioners acted affirmatively to
8 cause his injuries. A review of the complaint shows that he has failed to make such a showing. The
9 Board of Commissioners of Carson City shall be dismissed from this action with prejudice.

10 B. Claims for Relief

11 Plaintiff raises claims related to three separate periods of time during which he was
12 detained in the Carson City Jail as a pretrial detainee: July 8, 2008 through August 15, 2008, October
13 11, 2008 through November 5, 2008, and November 13, 2008 through November 18, 2008.

14 Counts One, Six and Eleven

15 In counts one, six, and eleven, plaintiff complains his due process rights were violated
16 when defendants held him in an isolation cell and subjected him to treatment intended to constitute
17 punishment. He claims he was denied a bed or other furniture, regular exercise, cleaning supplies,
18 frequent clean clothes, regular showers and shaves, and was afforded no privacy for use of the toilet, all
19 without due process. He contends as a result of this punitive setting he suffered emotional pain,
20 depression, and some physical injury or illness, such as athlete's foot and cracking feet. These facts set
21 out a potential claim related to the conditions of his confinement.

22 "Where a particular amendment 'provides an explicit textual source of constitutional
23 protection' against a particular sort of government behavior, 'that Amendment, not the more generalized
24 notion of "substantive due process," must be the guide for analyzing [a plaintiff's] claims'." *Albright v.*
25 *Oliver*, 510 U.S. 266, 273-74 (1994) (Rehnquist, C.J., for plurality) (quoting *Graham v. Connor*, 490
26 U.S. 386, 395 (1989)). Therefore, plaintiff's claims will be analyzed under the Eighth Amendment right

1 to be free from cruel and unusual punishment rather any generalized notions of substantive due process
 2 under the Fourteenth Amendment. A prison official may be held liable under the Eighth Amendment
 3 for denying humane conditions of confinement only if he knows that inmates face a substantial risk of
 4 serious harm and disregards that risk by failing to take reasonable measures to abate it. *Farmer v.*
 5 *Brennan*, 511 U.S. 825, 847 (1994). In this instance, the key factors require plaintiff to demonstrate that
 6 he faced a “substantial risk of serious harm.” He has not done so because the Prison Litigation Reform
 7 Act requires a prior showing of physical injury before a Federal civil action may be brought by a prisoner
 8 confined in a jail, prison, or other correctional facility for mental or emotions injury while in custody.”
 9 42 U.S.C. § 1997e(e). This provision “requires a showing of physical injury that need not be significant
 10 but must be more than *de minimus*. *Oliver v. Keller*, 289 F.3d 623, 627 (9th Cir. 2002).

11 Here in count one, plaintiff alleges *de minimus* physical injuries such dry skin leading to
 12 cracked feet and a fungal infestation. In count six he alleges muscle atrophy from lack of exercise. In
 13 count eleven he alleges severe clinical depression requiring medication.¹ These injuries are *de minimus*
 14 or not directly arising from the conditions of his confinement. Thus, counts one, six, and eleven shall
 15 be dismissed.

16 Counts Two, Seven and Twelve

17 In counts two, seven, and twelve, plaintiff alleges due process violations in the three
 18 separate time-frames identified herein because he was placed in an isolation cell as a disciplinary
 19 sanction for “alleged rule violations” without due process. He contends he was denied fair notice of the
 20 charges against him, denied substitute counsel to assist with his defense, denied witnesses, refused an
 21 impartial hearing officer, denied a written statement of the decision, denied access to investigation
 22 reports, and that the appellate review was faulty.

23
 24
 25 ¹ In count eleven, plaintiff alleges the medication to treat his depression was improperly
 26 dispensed by deputies causing him to pass out, fall down, and cut his face. While this may be more than
 a *de minimus* injury, it does not arise from the conditions of his confinement, as described in count
 eleven.

1 In prison disciplinary matters, the minimum requirements of procedural due process
2 include: advance written notice of the claimed violation and a written statement of the factfinders as to
3 the evidence relied upon and the reasons for the disciplinary action taken. *Wolff v. McDonnell*, 418 U.S.
4 539, 563 (1974). Additionally, an inmate facing disciplinary proceedings should be allowed to call
5 witnesses and present documentary evidence in his defense “when permitting him to do so will not be
6 unduly hazardous to institutional safety or correctional goals.” *Id.* at 566. Plaintiff shall be permitted
7 to proceed as to counts two, seven, and twelve against defendants Fair and Wall, Sgt. Does 1, 2, 3 and
8 4, and Deputy Does 1 and 4.

9 Counts Three and Eight and Fifteen

10 Next, in counts three, eight and fifteen plaintiff alleges a denial of his Sixth Amendment
11 right to counsel because the location of his cell in relation to the jail telephones inhibited his ability to
12 speak privately with his criminal defense counsel.

13 The Sixth Amendment guarantees the effective assistance of counsel for a criminal
14 defendant facing potential imprisonment. *Strickland v. Washington*, 466 U.S. 668 (1984). This
15 guarantee requires that the attorney perform to a certain level in a criminal representation. It does not,
16 however, guarantee the criminal defendant that he will be allowed to speak with his attorney via the
17 telephone at any time he desires. *See e.g., Morris v. Slappy*, 461 U.S. 1, 14 (1983) (the right to counsel
18 does not include the right to a meaningful attorney-client relationship.) Moreover, plaintiff has not stated
19 that he was foreclosed from speaking with his attorney privately when the attorney visited him or made
20 arrangements to speak with him in person. Moreover, *Strickland* requires a showing that counsel’s poor
21 performance prejudiced his criminal defense. Plaintiff has not made such a showing. Thus, plaintiff has
22 not stated a claim for relief under the Sixth Amendment in counts three and eight and those counts shall
23 be dismissed.

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1 Counts Four, Nine and Thirteen

2 In these counts, plaintiff alleges he was denied his First Amendment right to meaningfully
3 access to the courts where defendants failed to provide him with legal research or reference materials
4 which would allow him to bring his various federal civil rights actions.

5 Prisoners have a constitutional right of access to the courts. *Lewis v. Casey*, 518 U.S. 343
6 (1996); *Bounds v. Smith*, 430 U.S. 817, 821 (1977), *cert. denied*, 488 U.S. 869 (1988). The right that
7 *Bounds* confirmed was not the right to a law library or legal assistance; rather “the right that *Bounds*
8 acknowledged was already well-established, the right of access to the courts.” *Lewis*, 518 U.S. at 349.
9 To establish a claim for any violation of the right of access to the courts, the prisoner must prove that
10 there was an inadequacy in the prison’s legal access program that caused him an actual injury. *See id.*
11 To prove an actual injury, the prisoner must show that the inadequacy in the prison’s program hindered
12 his efforts to pursue a nonfrivolous claim concerning his conviction or conditions of confinement. *Id.*
13 at 351.

14 Here, plaintiff acknowledges that with perseverance, he was able to file at least one
15 federal civil rights actions to contest the conditions of his confinement - this action being another.²
16 Being denied access to a law library or legal reference materials for a short periods of time, such at the
17 25 days identified in count nine, is not denial of access to the courts. Plaintiff has not shown that any
18 of his cases were dismissed with prejudice or that he has lost any claims or causes of action because of
19 the inability to access reference materials. These facts do not state a claim for relief and counts four,
20 nine, and thirteen shall be dismissed.

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22
23 ² The Court takes judicial notice of its own docket and notes here that plaintiff has filed
24 numerous actions with the court attempting to state a claim against the various defendants identified in
25 this matter arising from his pretrial detention in the Carson City Jail in 2008. For example plaintiff has
26 commenced case numbers 3:08-cv-00689-ECR-VPC; 3:09-cv-0041-BES-RAM; 3:09-cv-00420LRH-
RAM; 3:09-cv-00059-LRH-VPC; 3:09-cv-00109-RCJ-RAM; and this instant action, 3:09-cv-00110-
RCJ-RAM. The status of the actions varies, but several have been dismissed without prejudice for
plaintiff’s failure to pay the filing fee or make proper application to proceed *in forma pauperis*. At least
three are awaiting amendment of the complaint and screening.

1 Counts Five and Ten

2 In these two counts, plaintiff alleges his rights under the Eighth Amendment's prohibition
3 against cruel and unusual punishment were violated because he was denied proper dental care for a
4 fractured tooth which resulted in extreme pain and the inability to eat. In count six Plaintiff blames
5 defendants John Doe #2 and #3 for their intentional disregard for the doctor's order to schedule plaintiff
6 with a dental appointment and defendant David Ramsey, the physician who wrote the order, for failing
7 to ensure it was followed. In count ten, plaintiff contends that defendants Fair and Wall are responsible
8 for placing him in the uncomfortable conditions described in previous counts.

9 To constitute cruel and unusual punishment in violation of the Eighth Amendment, prison
10 conditions must involve the "wanton and unnecessary infliction of pain." *Rhodes v. Chapman*, 452 U.S.
11 337, 347 (1981). Generally, a prison's "obligation under the Eighth Amendment is at an end if it
12 furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and
13 personal safety." *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir.1982). A prison official violates the
14 Eighth Amendment when two requirements are met: (1) the deprivation alleged must be, objectively,
15 sufficiently serious, *see Farmer v. Brennan*, 511 U.S. 825, 834 (1994), *citing Wilson v. Seiter*, 501 U.S.
16 294, 298 (1991), and (2) the prison official possesses a sufficiently culpable state of mind. *See id.*
17 (*citing Wilson*, 501 U.S. at 297). In prison-condition cases the necessary state of mind is "deliberate
18 indifference." *See Helling v. McKinney*, 509 U.S. 25, 32-33(1993) (inmate health); *Wilson*, 501 U.S.
19 at 302-03 (general conditions of confinement); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (inmate
20 health).

21 Plaintiff has stated a claim against Ramsey and John Does #2 and #3. He has not,
22 however stated a claim here against defendants Fair and Wall as he fails to show that the fact he was
23 being housed in the isolation resulted in the denial of dental care. Counts five and ten may proceed.
24 Defendants Fair and Wall are dismissed from count ten.

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1 Count Fourteen

2 In this claim for relief, plaintiff alleges the conditions of his confinement were further
3 diminished when defendants Lee and Collazo placed him in a safety cell as punishment for “disciplinary
4 violations” without due process. He further alleges that defendant Mays was aware of and sanctioned
5 this placement.

6 A pretrial detainee’s rights to due process in disciplinary proceedings rests on his liberty
7 interest in remaining free from restraint which “imposes atypical and significant hardship on the inmate
8 in relations to the ordinary incidents of prison life.” *Sandin v. Connor*, 515 U.S. 472, 484 (1995). Here
9 plaintiff says he was placed in the safety cell for a single day prior to disciplinary charges, but “for
10 behavior which amounts to a disciplinary violation.” These facts do not represent atypical and
11 significant hardships, particularly due to the short duration of the deprivation and the admission that
12 plaintiff’s behavior precipitated the placement. Count fourteen shall be dismissed.

13 **IT IS THEREFORE ORDERED** that plaintiff’s motion to file longer complaint (docket
14 #13) is **GRANTED**. The Clerk shall detach and file the amended complaint.

15 **IT IS FURTHER ORDERED** Counts One, Three, Four, Six, Eight, Nine, Eleven,
16 Thirteen and Fourteen are **DISMISSED WITH PREJUDICE**.

17 **IT IS FURTHER ORDERED** that defendants Carson City Board of Commissioners,
18 Furlong, Mays, Lee, Collazo and John Doe Policy-Maker are **DISMISSED FROM THE ACTION**
19 **WITH PREJUDICE**.

20 **IT IS FURTHER ORDERED** that the Amended Complaint shall proceed on Counts
21 Two, Five, Seven, Ten, and Twelve against defendants Fair, Wall, Ramsey, Sgt. Does #1, #2, #3, and
22 #4; and Deputy Does #1, #2, #3, and #4.

23 **IT IS FURTHER ORDERED** as follows:

24 1. The Clerk shall electronically serve a copy of this order, including the attached
25 Notice of Intent to Proceed with Mediation form, along with a copy of plaintiff’s complaint, on the
26 Office of the Attorney General of the State of Nevada, to the attention of Pamela Sharp.

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Name

2 _____
Prison Number (if applicable)

3 _____
Address

4 _____

5 _____

6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA
8

9 _____,)
Plaintiff,)

10 v.)

11 _____)

12 _____)
13 Defendants.)

14 _____)

Case No. _____

**NOTICE OF INTENT TO
PROCEED WITH MEDIATION**

15 This case may be referred to the District of Nevada's early inmate mediation program. The
16 purpose of this notice is to assess the suitability of this case for mediation. Mediation is a process by
17 which the parties meet with an impartial court-appointed mediator in an effort to bring about an
18 expedient resolution that is satisfactory to all parties.

19
20 1. Do you wish to proceed to early mediation in this case? ____ Yes ____ No

21 2. If no, please state the reason(s) you do not wish to proceed with mediation? _____

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25 3. List any and all cases, including the case number, that plaintiff has filed in federal or state court
26 in the last five years and the nature of each case. (Attach additional pages if needed).

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4. List any and all cases, including the case number, that are currently pending or any pending grievances concerning issues or claims raised in this case. (Attach additional pages if needed).

5. Are there any other comments you would like to express to the court about whether this case is suitable for mediation. You may include a brief statement as to why you believe this case is suitable for mediation. (Attach additional pages if needed).

This form shall be filed with the Clerk of the Court on or before thirty (30) days from the date of entry of this order.

Counsel for defendants: By signing this form you are certifying to the court that you have consulted with a representative of the Nevada Department of Corrections concerning participation in mediation.

Dated this ____ day of _____, 2010.

Signature

Name of person who prepared or
helped prepare this document